IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. [redacted] 12

SANDRA LEE NEELY, by her legal representative and guardian, Cecile V. Neely,

Petitioner,

vs.

MARTIN K. EBY CONSTRUCTION CO., INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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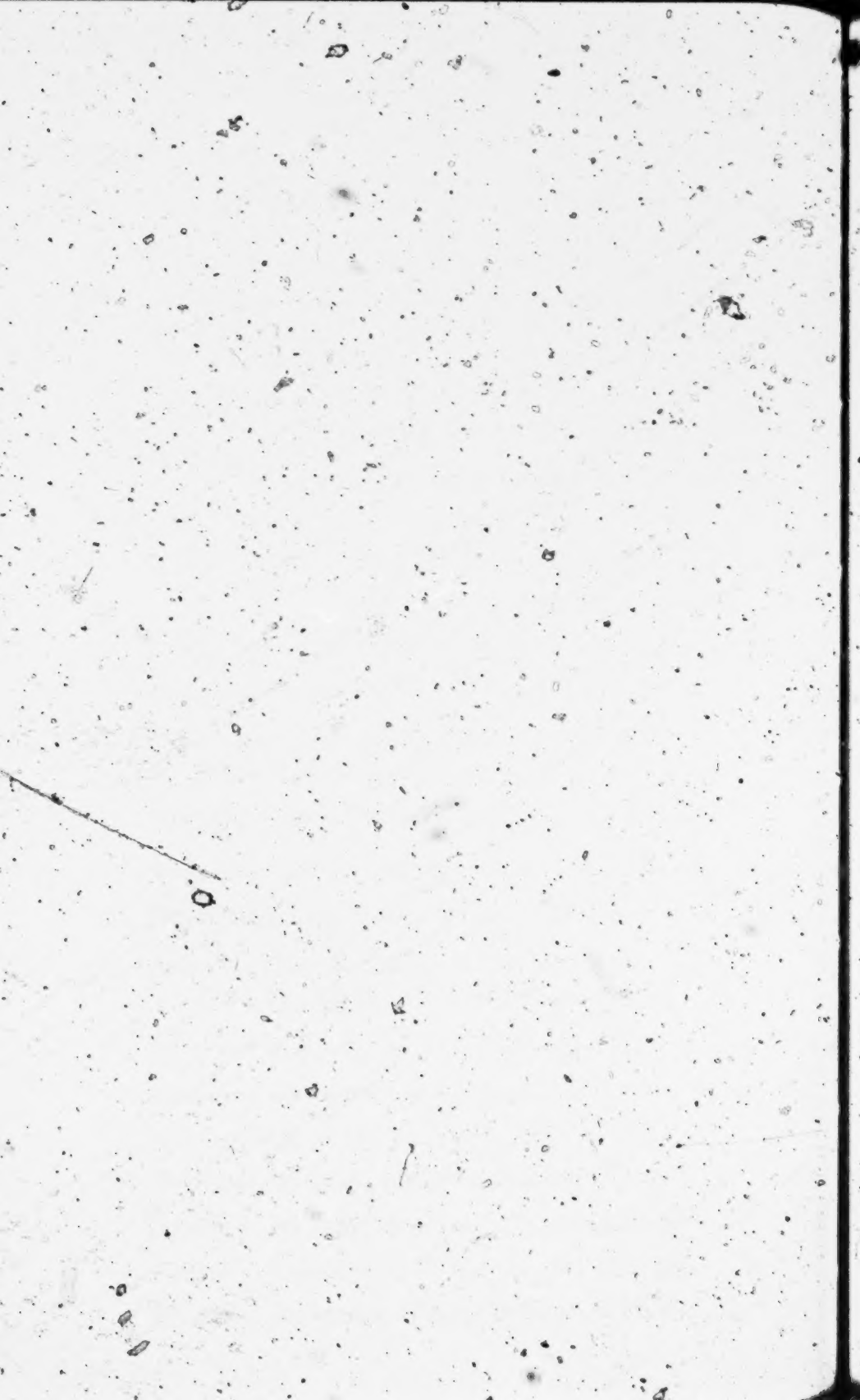

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OPINIONS BELOW

This writ of certiorari was issued to review a judgment of the Court of Appeals of the Tenth Circuit in Case No. 7796 entered on April 26, 1965 (344 F.2d 482). The decision of the Circuit Court reversed a judgment in favor of this petitioner on a jury verdict obtained in the United States District Court for the District of Colorado.

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1965. The petition for writ of certiorari was filed on July 22, 1965 and was granted on November 15, 1965. The jurisdiction of this court rests on Title 28, United States Code, Sec. 1254 (1).

QUESTIONS PRESENTED

I. Did the Court of Appeals err in deciding that there were no jury issues of negligence and proximate cause?

II. Whether Rule 38(a) of the Federal Rules of Civil Procedure and the Seventh Amendment of the Constitution of the United States preclude the Court of Appeals from instructing the trial court to dismiss an action wherein the trial court denied the defendant's Motions for New Trial and for Judgment Notwithstanding the Verdict and entered judgment for the plaintiff?

III. Whether the Court of Appeals, after deciding that respondent should have been granted a judgment n.o.v., had power under Rule 50 of the Federal Rules of Civil Procedure and the decisions in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212; *Globe Liquor Co. v. San Roman*, 332 U.S. 571; and *Weade v. Dichmann, Wright & Pugh*, 337 U.S. 801, to order the case dismissed and thereby deprive petitioner of any opportunity to invoke the trial court's discretion on the issue of whether petitioner should have a new trial?

IV. Whether the Court of Appeals erred in ordering the District Court not merely to enter a judgment n.o.v. for respondent but to dismiss plaintiff's case in view of Rule 50(c)(2) of the Federal Rules of Civil Procedure which gives a party whose verdict has been set aside the right to make a motion for a new trial not later than 10 days after entry of judgment notwithstanding the verdict?

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES INVOLVED

Seventh Amendment of the Constitution of the United States provides as follows:

> Jury Trial in Civil Actions.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

Rule 38(a) of the Federal Rules of Civil Procedure provides as follows:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Rule 50 of the Federal Rules of Civil Procedure, as amended, effective July 1, 1963, provides as follows:

> (a) MOTION FOR DIRECTED VERDICT: WHEN MADE; EFFECT. A party who moves for a direct verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.
>
> (b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a

motion for a directed verdict made at the close of all evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) SAME: CONDITIONAL RULINGS ON GRANT OF MOTION.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining, whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new

trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court. (2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) SAME: DENIAL OF MOTION. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

STATEMENT

The minor plaintiff (petitioner here), acting through her legal representative, brought an action for damages for the wrongful death of her father while he was working as an engineer in the erection of a missile launching silo in Colorado. Jurisdiction of the trial court was based upon diversity of citizenship and an amount in controversy in excess of $10,000.00, exclusive of costs and interest as provided by Title 28, United States Code, Sec. 1332.

The plaintiff claimed that her father died as a direct result of a fall from a certain wooden scaffold or platform and that his fall was the proximate result of the negligence

of the defendant in the erection, maintenance and supervision of that scaffold or platform. A federal jury awarded her the sum of $25,000.00 damages, this being the maximum award permissible under Colorado's wrongful death statute. The defendant filed a motion for judgment notwithstanding the verdict in accordance with a motion for directed verdict previously made, and in the alternative, the defendant moved for a new trial. The trial court denied both motions and entered judgment on the verdict in favor of the plaintiff. The defendant (respondent here) appealed to the Court of Appeals which reversed the action with instructions to the trial court to dismiss.

Petitioner applied for writ of certiorari which was granted on November 15, 1965.

ARGUMENT

I. DID THE COURT OF APPEALS ERR IN DECIDING THAT THERE WERE NO JURY ISSUES OF NEGLIGENCE AND PROXIMATE CAUSE?

The petitioner contends that there was produced at the trial of this case sufficient evidence to be submitted to the jury on both the issue of negligence and the issue of proximate cause.

To orient the Court with the scene of the occurrence, the petitioner was inserted in the Appendix at the back of her brief, a reproduction of plaintiff's Exhibits 1, 2, 3 and 5, which are explained in the transcript of record on pages 17 through 23; and a reproduction of plaintiff's trial Exhibit 10, which is explained in the transcript of record on pages 23 and 24.

Respondent knew the purpose for which the scaffold was being built (R. 47, 48, 75) or modified (R. 16) and owed a duty to Gary Neely, deceased, to provide him with a safe scaffold from which to gain access to the counter-weights in quadrants II and III. Mr. Blanchard, the day silo captain, requested modification of the scaffold because a piece of

wood interfered with the movement of the counter-weights (R. 15, 16) and prevented the engineers from taking the critical measurements. Instead of carefully trimming the scaffold to comply with the requested change, the respondent breached its duty by narrowing the scaffold to such an extent as to make the distance from the scaffold to the counter-weight in quadrant II dangerously long. It was made perfectly clear to the defendant that the only purpose of the scaffold was to permit the deceased and his co-workers access to the counter-weights so that they might complete their mesurements (R. 16, 75). Mr. Imel, the carpenter foreman for the respondent, made it clear that he "... had built a scafford for them to work *off of* (R.75) and not to work *on*.

For some inexplicable reason, the respondent chose to build a railing along the back and one side of the scaffold, which railing acted as a barrier between the scaffold and the counter-weight in quadrant II (R. 46, 47 and plaintiff's Exhibits 1, 2, 3, 5 and 10) thus materially increasing the distance to be traveled over empty space by forcing Mr. Neely to take a diagonal route. On the side of the scaffold leading to the counter-weight in quadrant III there was no railing (R.57) to interfere with the workers' access.

The jury had before it the photographs which were admitted into evidence. On plaintiff's trial Exhibit 3, the flooring of the scaffold at the point where the workers must traverse it, does not appear to be completed and raised impediments can be seen.

Three large pieces of timber are seen protruding out from under the plyboard floor-covering for a distance which appears to be about 6 inches. These protruding beams create hazards to walking from the quadrant III side of the scaffold to the quadrant II side. In addition, the kickboard of the railing is shown to protrude beyond the upright support to provide still another hazard to safe passage.

The scaffold was built or modified solely under the direction of Mr. Imel, an employee of the respondent, (R.47).

The testimony of Mr. Keenan, a former employee of the respondent, was self-contradictory. At one point he indicated that because of the lunch hour there was not enough time to complete the scaffold (R.47), and at another point he said that the scaffold was as complete as the respondent intended (R.50, 54).

From the above evidence, the jury could well conclude that because the scaffold was narrowed creating too large a space between it and the counter-weight in quadrant II, because the respondent placed or failed to remove the railing, and because of the hazardous condition of the floor of the scaffold and the protruding kickboard of the railing, the respondent was negligent and that this negligence was a proximate cause of the fall and of Mr. Neely's death.

In reinstating a verdict previously set aside by a trial court, the Supreme Court of the State of Colorado stated:

> "The evidence and reasonable inferences to be drawn therefrom goes beyond proving a fall and injuries. It is not at all unusual that plaintiff could not testify as to whether she stepped in the hole, on the edge thereof, or on debris in or about the hole. The fact remains that the fall occurred at the place of the hazard while plaintiff was proceeding in a normal manner and at the place designated for crossing by pedestrians." *Jasper v. City and County of Denver*, 144 Colo. 43, 354 P.2d 1028 (1960).

In the *Jasper* case, the plaintiff testified that she was proceeding along a sidewalk in Denver, arrived at an intersection, looked to see if a certain bus was coming, looked to see the color of the traffic light, then stepped off the curb into the crosswalk where she fell suffering injuries. The evidence disclosed negligence on the part of the defendant City since a hole was found in the crosswalk at a point near the gutter. There were no witnesses to the fall. The plaintiff said only that she stepped off the curb, hit something and went down. After the fall, she found herself sitting in

the hole. There was no direct testimony that the hole itself caused the fall. The jury must have believed that the element of proximate cause was present, for it found in her favor. The trial judge felt that proof had failed and he set aside the verdict. But the Supreme Court of Colorado was of the opinion that the jury may use its own reason and experience in deducing the presence of proximate cause from known facts.

Mrs. Jasper lived to testify. Mr. Neely did not. However, there is a presumption that Mr. Neely exercised due care for his own safety at the time of his death. *Looney v, Metropolitan R. Co.*, 200 U.S. 480, 488; *Tennant v. Peoria & P.U. Ry Co.*, 321 U.S. 29, 34.

Another Colorado case illustrating the proof of proximate cause by circumstantial evidence is *Remley v. Newton*, 147 Colo. 401, 364 P.2d 581 (1961). A six-year-old guest at a dude ranch was seen playing with a tether ball affixed to a pole in the playground area. A few minutes later his mother and father heard cries from the playground and rushed out to find their boy lying unconscious on the ground, his head and face covered with blood, his head a few inches from a tether ball pole which had fallen over. The trial court took the case from the jury, one of the reasons being that "... there is no evidence to show that the pole was what hit the plaintiff ..." The Supreme Court reversed and remanded the lawsuit for a new trial quoting from 20 Am. Jur. p. 1043, sec. 1189 as follows:

> "The rule as to circumstantial evidence in a civil case is that a party will prevail if the preponderance of the evidence is in his favor. Where two equally plausible conclusions are deducible from the circumstances, the jury is left to decide which shall be adopted."

There may be other theories which are equally plausible, but when the jury finds for the petitioner as they did in this case, the Court of Appeals, in ordering the suit dismissed, commits "... an undue invasion of the jury's his-

toric function." *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 116; *Lavender v. Kurn*, 327 U.S. 645, 652; *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500; *Dennis v. Denver & Rio Grande Western R. Co.*, 375 U.S. 208; *Davis v. Baltimore & Ohio R. Co.*, 379 U.S. 671.

The rule of circumstantial evidence applies equally to the establishment of negligence. As was stated in *Remley v. Newton*, supra.:

> "While it is true that 'proof of the happening of an accident, or the incurrence of an injury alone raises no inference of negligence,' it is equally true that negligence may be established by the facts and circumstances surrounding an accident." 364 P.2d 583.

II. WHETHER RULE 38(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE SEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES PRECLUDE THE COURT OF APPEALS FROM INSTRUCTING THE TRIAL COURT TO DISMISS AN ACTION WHEREIN THE TRIAL COURT DENIED THE DEFENDANT'S MOTIONS FOR NEW TRIAL AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND ENTERED JUDGMENT FOR THE PLAINTIFF?

Facts tried by a jury in this case were re-examined by the Court of Appeals otherwise than according to the common law in violation of the Seventh Amendment of the Constitution of the United States and Rule 38(a) of the Federal Rules of Civil Procedure.

The Seventh Amendment flatly declares that:

> "No fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

This court has had occasion to apply this mandate in *Metropolitan R. Co. v. Moore*, 121 U.S. 558, 573, and *Fairmount Glass Works v. Coal Co.*, 287 U.S. 474, 481.

According to *Crim v. Handley*, 94 U.S. 652, 657, once a common law issue was tried to a jury, the appellate court's jurisdiction was limited to the finding of errors of law in the proceedings and the award of a *venire facias de novo*, or new trial. There was no provision at common law for dismissal of such a case once a jury had returned a verdict for a plaintiff.

This Court repeatedly has expressed its abhorrence of invasion of the jury function by the court. A particularly apt expression of the jury's role and importance is found in *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.
>
> "Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial."

III. WHETHER THE COURT OF APPEALS, AFTER DECIDING THAT RESPONDENT SHOULD HAVE BEEN GRANTED A JUDGMENT N.O.V., HAD POWER UNDER RULE 50 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE SUPREME COURT OF THE UNITED STATES DECISIONS IN CONE V. WEST VIRGINIA PULP & PAPER CO., 330 U.S. 212; GLOBE LIQUOR CO. V. SAN ROMAN, 332 U.S. 571; and WEADE V. DICHMANN, WRIGHT & PUGH, 337 U.S. 801, TO ORDER THE CASE DISMISSED AND THEREBY DEPRIVE PETITIONER OF ANY OPPORTUNITY TO INVOKE THE TRIAL COURT'S DISCRETION ON THE ISSUE OF WHETHER PETITIONER SHOULD HAVE A NEW TRIAL?

The Court of Appeals was without authority to order the case dismissed. Assuming that Rule 50(d) of the Federal Rules of Civil Procedure permits the Court of Appeals to reverse a trial court and order the entry of a judgment notwithstanding the verdict, there is certainly no provision for the Court of Appeals to order the dismissal of an action under the circumstances of this case.

In this case, the Court of Appeals had four (or perhaps five) alternatives available to it. It could have: (1) affirmed the judgment; (2) reversed and remanded with instructions to the trial court to determine whether or not a new trial should be granted; (3) reversed and remanded with instructions to the trial court to determine whether or not a judgment notwithstanding the verdict should be entered; (4) reversed and remanded with instructions to grant a new trial; or (5) *perhaps* it could have reversed and remanded with instructions to grant a judgment notwithstanding the verdict.

As we have previously argued from the case of *Crim v. Handley*, 94 U.S. 652, 657, the appellate court's powers did not extend to the fifth alternative. However, assuming for the moment that this most drastic remedy would not violate the United States Constitution, nevertheless, the party who

revailed in the trial court should certainly have been given n opportunity to move for a new trial under Rule 59 or to ove for a dismissal without prejudice under Rule 41. This, e believe, is the import of the decision in *Cone v. West irginia Pulp & Paper Co.*, 330 U.S. 212, 216, 217. This posi-on is certainly bolstered by the 1963 amendments to Rule 0 which are apparently intended in part to clarify this very roblem.

To summarily dismiss Sandra Lee Neely out of court, us leaving her no remedy and no opportunity to direct the ttention of either the trial or the appellate court to errors gainst her, is to defeat the ends of justice and to deprive er of the fruits of a jury verdict.

> "Determination of whether or not a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no printed transcript can impart." *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216; *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 574.

The action of the appellate court in dismissing this se has deprived the petitioner of her opportunity to in-oke the trial court's discretion on the issue of whether the etitioner should have a new trial because of errors com-itted by the trial court and heretofore not enumerated. or does it give her an opportunity to move for a nonsuit o that she might file a new action after further prepara-on as is suggested in *Cone v. West Virginia Pulp & Paper o., supra.*

IV. WHETHER THE COURT OF APPEALS RRED IN ORDERING THE DISTRICT COURT NOT IERELY TO ENTER A JUDGMENT N.O.V. FOR RE-PONDENT BUT TO DISMISS PLAINTIFF'S CASE N VIEW OF RULE 50(c)(2) OF THE FEDERAL ULES OF CIVIL PROCEDURE WHICH GIVES A ARTY WHOSE VERDICT HAS BEEN SET ASIDE

THE RIGHT TO MAKE A MOTION FOR A NEW TRIAL NOT LATER THAN 10 DAYS AFTER ENTRY OF THE JUDGMENT NOTWITHSTANDING THE VERDICT?

Rule 50(c)(2) provides:

"The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict."

Had the trial judge set aside Sandra Lee Neely's verdict after hearing on the motion for judgment notwithstanding the verdict, then the plaintiff could have filed a motion for new trial under Rule 59, Federal Rules of Civil Procedure, setting out those erroneous rulings of the trial court which may have interfered with the plaintiff's attempts to prove negligence and proximate cause. For example, the plaintiff has never had an opportunity to complain that the trial court refused to allow plaintiff's witnesses to testify as experts as to whether or not the scaffold was adequate and proper to do the job that it was intended to do. (R. 27, 28, 29, 43, 59, 77 and 79)

Dismissal of this case by the Court of Appeals suddenly left the plaintiff, your petitioner, without a remedy. This amounts to a deprivation of the fruits of a $25,000.00 verdict and judgment without due process of law in violation of the mandate of Rule 50(c)(2).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and that the verdict of the jury and the judgment of the trial court be reinstated and for such other and further relief as to this Honorable Court may seem appropriate.

Respectfully submitted,

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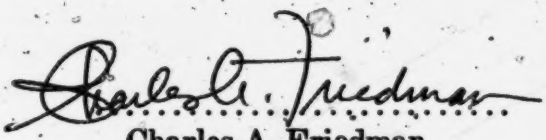
PROOF OF SERVICE

I, Charles A. Friedman, one of the attorneys for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 5th day of January, 1966, I served a copy of the foregoing Brief of the Petitioner on John C. Mott, Anthony F. Zarlengo, and Joseph S. McCarthy, attorneys for respondent, by mailing copies in duly addressed envelopes with proper postage prepaid, to John C. Mott, Esq., 1020 American National Bank Building, Denver, Colorado, 80202; Anthony F. Zarlengo, Esq., 595 Capitol Life Center, Denver, Colorado, 80203; and Joseph S. McCarthy, Esq., 745 Washington Building, Washington 5, D. C.



Charles A. Friedman

APPENDIX